SUPREME COURT OF THE UNITED STATES

No. 244

OCTOBER TERM, 1948

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS, ET AL.,
APPELLANTS,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY AND UNION BARGE LINE CORPORATION

Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF APPELLEES

ARTHUR A. MORENO,
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SELIM B. LEMLE,
LOUIS G. LEMLE,
(Of Counsel).

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May It Please the Court:

This matter comes before the Court on the appeal of Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, and George Montgomery, State Tax Collector of Louisiana for the Parish of Orleans, to review judgments rendered

against each in favor, respectively, of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation for the refund of ad valorem taxes for the years 1944 and 1945. The causes were tried in the United States District Court for the Eastern District of Louisiana, which rendered judgments in favor of each of the appellees for the amount of taxes claimed by each for the respective years. (R. 31).

On appeal to the United States Circuit Court of Appeals (Fifth Circuit), the judgments in favor of each of the plaintiffs in those suits, appellees here, were affirmed and it is from these judgments affirming the judgments of the United States District Court that appeals have been made to this Court. The basis of the appeals is that the United States District Court and the United States Circuit Court of Appeals (Fifth Circuit) held the statute under which the taxes were alleged to have been assessed to be unconstitutional. The appellees starkly deny that the United States Circuit Court of Appeals declared the statute, under which the taxes were assessed, as unconstitutional. (Act 152 of 1932, as amended by Act 59 of 1944).

Statement of the Case

The first two appellees were incorporated under the laws of Delaware, while the third is incorporated under the laws of Pennsylvania. Each one is engaged in transportation in interstate commerce from points on the Ohio River and the Mississippi River to New Orleans, Louisiana, and to points in Texas. The taxes levied under the act are ad valorem taxes on the towboats and barges of the

respective corporations. These towboats and barges are concededly engaged exclusively in the transportation of interstate commerce. The United States District Court and the United States Circuit Court of Appeals each found that the towboats and barges came into Louisiana for the purposes of interstate commerce, and remained within the State only a sufficient length of time to enable the cargoes to be unloaded and to load cargoes for transportation to states other than Louisiana. The courts held that there was no intent that this water equipment should remain in Louisiana, so as to acquire a taxing situs by being incorporated into the mass of property of the State, nor did either court find that, regardless of intent of the appellees, that such watercraft was permitted to remain in Louisiana sufficiently long to be incorporated into the mass of property in the State, and thereby acquire a situs for local taxation. Neither court held that statute under which the taxes were assessed as unconstitutional because violative of the "due process clause" of the Fourteenth Amendment, nor unconstitutional because of operating within the proscriptive area of interstate commerce.

The appeals in these cases have been taken upon a misapprehension as to the holding of the United States District Court and of the United States Circuit Court of Appeals. This misapprehension is demonstrated with mathematical precision by the history of the litigation.

At approximately the same time that suits were filed on behalf of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation, there was also a suit filed on be-

half of the DeBardeleben Coal Corporation, which was incorporated under the laws of Delaware. The same grounds of unconstitutionality as was urged in these cases was urged in the case of DeBardeleben Coal Corporation. The United States District Court found, in favor of the DeBardeleben Coal Corporation, that the assessment upon which the taxes were based was invalid, as distinguished from unconstitutional, because there had been included in the assessment property situated in Alabama and which had never been in Louisiana, and, consequently, had not been within the taxing reach of the State of Louisiana. Impliedly, it upheld the constitutionality of the statute, but decided in favor of the DeBardeleben Coal Corporation because of an invalid method of assessment under a constitutional statute.

On appeal, in the case of DeBardeleben Coal Corporation, which was consolidated with the cases before this Court, it was argued as involving the same principles of unconstitutionality. The Court of Appeals held that the assessment was not void in whole, but was void in part, because of the inclusion of property located permanently in Alabama with property in Louisiana as the measure of the assessment. It remanded the case to the United States District Court for the purpose of excising the property in Alabama from the assessment, and decreed that taxes based upon property in Louisiana should be the measure of the tax. Both the United States District Court and the United States Circuit Court of Appeals found that although the Debardeleben Coal Corporation was a Delaware corporation, that its property had acquired a situs for taxation in Louisiana and, therefore, that Act 152 of

1932, as amended, was applicable and controlling when properly applied.

Indisputably, if it had held that the act here under review was unconstitutional when applied to the property of the DeBardeleben Coal Corporation, having a situs in Louisiana, it would have affirmed the judgment of the United States District Court. When it remanded the case of the DeBardeleben Coal Corporation to the United States District Court, it thereby declared it subject to the statute and thereby recognized the vitality of the statute, and, consequently, did not declare it unconstitutional.

It must follow as a matter of law and logic, that the statute could not be constitutional as applied to the property of the DeBardeleben Coal Corporation, having a situs in Louisiana, and yet be unconstitutional when applied to the property of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation. The differentiation between the three latter corporations and the DeBardeleben Coal Corporation rested, not upon the nullification of a statute as being in violation of the Fourteenth Amendment, or as offending the Commerce Clause, but rested upon a difference of fact between property having a situs in Louisiana and property having a situs beyond the sovereignty of Louisiana. Unquestionably, if and when the statute again in another case comes before the United States Circuit Court of Appeals for the Fifth Circuit, it will again uphold its constitutionality and will apply the statute if it finds that property assessed thereunder has a

situs in Louisiana. If the American Barge Line Company, the Mississippi Valley Barge Line Company and the United Barge Line Corporation should permit their towboats and barges to remain in Louisiana, so as to acquire a taxing situs, the statute will be applied. *Old Dominion Steamship Company v. Virginia,* 198 U. S. 299. The conclusion is inescapable that the appeal in this case does not lie, when based upon the ground that a state statute has been declared unconstitutional.

However, pretermitting whether an appeal lies because the Court of Appeals did or did not hold the statute unconstitutional nevertheless tested by the jurisprudence of this Court, the statute is unconstitutional.

The Appellants Assign as Error: (R. 127)

1. The Circuit Court of Appeals erred in holding that a taxing situs need be shown to allow New Orleans and Louisiana to collect its share of the taxes on these towboats and barges when the Louisiana Statute (Act 59 of 1944) specifically provides that the proportionate tax is collectible upon a showing that respondent barge line companies run their lines into Louisiana, which is admitted, and no actual situs need be shown as such, to collect these taxes under the Louisiana Statute.

2. The Circuit Court of Appeals therefore erred in applying the law of situs in these cases.

3. The Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in

which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

4. The Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.

5. The Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in effect holding that these provisions of the Louisiana Statute violate the due-process-of-law clause of the 14th Amendment of the Constitution of the United States.

6. The Circuit Court of Appeals erred in holding for respondent barge lines in these cases decreeing these taxes illegal and invalid.

The clear and unequivocal answer to the statement of error is that the Court of Appeals did not err in holding the statute unconstitutional, because it did not declare it unconstitutional but applied its terms to the DeBardeleben case.

The Pleadings

The plaintiffs invoked §1 of the 14th Amendment to the Constitution of the United States, and Art. 1, §2 of the Bill of Rights of the Constitution of Louisiana as taking the property of plaintiffs without due process of law, and also the exaction of said taxes as unconstitutional because violative of Art 1, §8 of the Constitution of the United States as being a tax on interstate commerce. The invocation of these constitutional provisions was based upon the fact that the towboats and barges of the respec-

tive plaintiffs had no taxing situs in Louisiana, and that the method of taxation was arbitrary and capricious and rested upon no principles of taxation as to the valuation of property, and so amounted to a taking of property without due process of law. The plaintiffs claimed a refund of taxes paid by each because unconstitutionally exacted.

All of the complaints set out substantially the same cause of action, and are virtually the same, except for the natural differences between the status of the plaintiffs and the amounts sued for. Each alleged that the Louisiana Tax Commission is a body created under the laws of the State of Louisiana for the purpose of fixing assessments on property having a situs in Louisiana and subject to the taxing power of the State.

Each alleged that it is engaged in the business of transporting merchandise and cargoes of various kinds in interstate commerce between ports variously situated in Pennsylvania, Ohio, Kentucky, Florida, Mississippi, Louisiana, Texas and other states; that in connection with its business, each owns and operates certain towboats and barges in the business of interstate transportation upon the navigable waters of the United States; that its towboats and barges are engaged continuously in the transportation in interstate commerce between the City of New Orleans and various ports on the Mississippi River and other rivers, and that these towboats and barges are only at times within the State of Louisiana for the sole purpose of either loading or unloading cargo, or passing through on interstate voyages; that the Louisiana Tax Commission has assessed the property of each as located in,

or having its situs, either legally or actually, in the State of Louisiana.

Each alleged the Louisiana Tax Commission has assessed the towboats and barges of each on a mileage basis, proportioned to the number of miles assumed to have been traversed by said equipment in Louisiana, and assumed to have been traversed in other states, notwithstanding the Louisiana Tax Commission had, and has, no knowledge of the number of miles traversed by such equipment within and without the State of Louisiana; that in making the assessment, it did not know whether all of the towboats and barges of each had come into the State of Louisiana during the year of the assessments, and had never inspected, or viewed said watercraft to fix the value thereof, but had assumed an arbitrary value for each towboat and barge, and by giving to all of the watercraft equipment of each plaintiff an arbitrary value, had allocated a percentage of such value as the basis of the assessments of the respective plaintiffs, and that such assessments were arbitrary and capricious, because based upon no known fact of value.

The Facts

The facts are clearly and forcefully summarized as to the operations of the three appellees in the findings of the United States District Court upon which was based the judgment in favor of the appellees. (R. 30).

"(1) The American Barge Line Company, which will hereafter be referred to simply as American, while the names of the remaining three plain-

tiffs, for the like reason of brevity and convenience, will be written: Mississippi Valley, Union and DeBardeleben, respectively, is, as previously stated, a Delaware corporation, and so are Mississippi Valley and DeBardeleben. None of the stockholders of either American or Mississippi Valley reside in Delaware, and the great majority of the DeBardeleben stockholders are likewise non-residents thereof. None of the officers and directors of either of said three named [fol. 230] corporations reside in Delaware, but the designated agent of each for the service of proceess in that State, Trust Corporation of Delaware, is there domiciled.

Union is a corporation organized and existing under the laws of Pennsylvania, with its domicile in the City of Pittsburgh, said State, where it maintains its principal business office.

Each of the four named corporations are lawfully engaged in transportation of freight upon inland waters of the United States, under authority of a certificate of public necessity and convenience issued to each by the Interstate Commerce Commission.

The 'taxed' towboats of American and DeBardeleben are enrolled under the United States shipping regulations pertaining to vessels engaged in domestic commerce (Title 46, Chap. 12, U. S. C. A.) at Wilmington, Delaware, and there, too, they have voluntarily registered their barges; while the towboats of Union are enrolled at Pittsburgh, and the watercraft of Mississippi Valley are enrolled at

St. Louis, Missouri. But this has little or no bearing as concerns the place of taxation. (51 Am. Jur. (1944), 913, pp. 807-809).

Under neither Delaware nor Pennsylvania law, is such marine equipment as is used in interstate commerce by American, Mississippi Valley, DeBardeleben, and Union, respectively, subject to state taxation.

(2) The towboats of American regularly operate between Pittsburgh and New Orleans, and occasionally make a trip from St. Louis to New Orleans. Its barges ply on the Mississippi and Ohio Rivers, between Pittsburgh and New Orleans, and up the Cumberland, the [fol. 231] Tennessee, the Monongahela and Kanawha Rivers, they operate, also, between Pittsburgh and Palmyra, Arkansas, and on the Intracoastal Canal.

Steel products originating in the Pittsburg territory generally compose the downstream cargoes of American, whether destined for, say, Louisville, Kentucky, Memphis, Tennessee, New Orleans, on the Mississippi River or Houston, Texas, on the Intracoastal Canal.

American has no warehouse at New Orleans, no stevedoring department, and operates no terminal there, as it does at Glassport, Pennsylvania, and at Louisville and Memphis, respectively. In its operations beyond New Orleans, it transfers loaded barges to the motive power of like water transportation services.

All of its downstream tows it delivers to Whiteman's Landing, Algiers, on the west bank of the Mississippi, in New Orleans, and from this point leaves on all of its upstream return trips.

Cargo consigned to New Orleans is then transferred from Whiteman's Landing to city docks (at whatever space thereon indicated by the respective consignee) and there unloaded by Mississippi Valley, under an arrangement between it and American, but when a particular cargo is destined for a point beyond New Orleans, the carrying barge or barges are picked up at the Landing by a vessel making the Intracoastal canal trip towards Houston, for instance, or, perhaps, by one proceeding further down the Mississippi to Port Sulphur or other nearby river point; none of which, American owns or operates.

[fol. 232] In the steady flow of interstate commerce so moved by American as far south as New Orleans, several towboats and many barges are used. One towboat may start a trip from Pittsburgh only to be substituted by one or more towboats on the way south, and some or all of the loaded barges making up the initial tow may be delivered to consignees at intervening ports, such as Louisville, Memphis, and Palmyra, Arkansas, to be replaced by loaded barges there awaiting transportation downstream, so that no special towboat or barge is allocated to service on any particular leg of the voyage, and barges are made available as and where tonnage is offered for transportation. The

tow load on any trip is always maintained, as nearly as practicable, of such number of barges and cargo weight as insures the towboat's pushing ahead at maximum efficiency.

All of the foregoing holds true, likewise, on return or upstream trips from New Orleans.

No towboat is permitted to remain in port any longer than is necessary to deliver cargo and to take on barges; at New Orleans, no longer than it takes to break up the downstream tow at Whiteman's Landing, and to then make up a tow for the return trip up the Mississippi.

There is sometimes a slight delay awaiting the delivery of loaded barges for the return trip, because seldom are empties towed upstream but some are sent down to New Orleans to load nothward-bound tonnage offered. But consistent effort is made to expedite all return trips, inasmuch as it is only by keeping the watercraft on the move that money is made, as American's acting superintendent of transportation expressed it in testifying.

[fol. 238] Petroleum products, in the main, constitute American's upstream tows, although there are cargoes of alcohol and sugar. These cargoes are assembled at Whiteman's Landing, delivery being effected there from Texas and Louisiana points, for their inclusion in American's upstream operations.

American, by means of its wholly-owned subsidiary Jeffersonville Boat and Machine Works,

with plant located at Jeffersonville, Indiana, across the Ohio River from Louisville, Kentucky, where American maintains its chief business office, employing no less than 25 persons, does all general repair and overhaul work upon its marine equipment, but emergency repairs on a trip are necessarily done at the nearest boatways available.

In 1943 and 1944 American maintained a constant heavy traffic to and from New Orleans. It owned slightly less than 200 barges and 10 towboats, 9 of which were kept in operation, but 4 of them never came to New Orleans, and neither did some of its barges, but others did come rather constantly. In 1944 American added, under charter from the Defense Plant Corporation, 4 towboats and 40 barges to its marine equipment so being used in interstate commerce.

In 1943, American's total tonnage loaded and unloaded at various ports of call was 977,705.57 tons, 72,504.61 of which were loaded on at New Orleans, and 33,647.77 unloaded. In addition to this, there were assembled at Whiteman's Landing for American's upstream tows 18,732.63 tons, loaded at two points south of New Orleans, and 120,973.62 tons loaded at Intracoastal Canal points all the way to Houston, Texas. The total loadings leaving New Orleans in American's upstream traffic aggregated, therefore, 212,210.86 tons of the total tonnage transported in 1943, [fol. 234] or about 22% thereof. The actual loadings at New Orleans approximated 7%. (Exhibit No. 5).

Of the total time covered by their interstate commerce operations of 1943, American's towboats spent no more than approximately 3.8% thereof within the boundaries of Louisiana:

Only five of its own tow boats moved in and out of the State, to which must be added the Java Sea, taken over, under charter, on November 24, 1943.

The schedule of time spent at the Port of New Orleans by American's said five vessels during that year shows the following state of facts, viz:

The 'Jefferson' was in one or more Louisiana ports, in all months except February and April, for a total of 33 days, 7 hours, and 45 minutes, 24 *hours*, 7 hours, and 30 minutes of which were spent in making repairs, leaving 9 hours and 15 minutes for the vessel's usual activities such as dropping and picking up barges, taking on supplies, water, fuel, pumping out barges, etc. (Italics by the Court).

The 'National', in 6 months, i. e.:—April, June, August, September, October and November, for 9 days, 3 hours, and 15 minutes,—4 days, 4 hours, and 45 minutes thereof in making repairs; thus leaving but 4 days, 22 hours and 30 minutes for all other purposes.

The 'Patriot' in 6 months, i. e.:—April, May, June, July, August and September, for 11 days, 10 hours, and 15 minutes,—7 days, 23 hours,

and 15 minutes thereof in making repairs; leaving 3 days and 11 hours for all other purposes.

[fol. 235] The 'Pioneer', in each of the 12 months, for 49 days, 7 hours, and 5 minutes,—24 days, 13 hours and 45 minutes in making repairs; leaving 24 days, 17 hours, and 20 minutes for all other purposes.

The 'Progress', in 8 months, i. e.:—February, March, April, June, July, October, November and December for 22 days, 3 hours, and 15 minutes, —15 days, 18 hours and 10 minutes thereof in making repairs; leaving 6 days, 9 hours and 5 minutes for all other purposes.

In 1944, American made 73 such 'in and out' trips, having chartered four more Defense Plant Corporation power vessels, and some forty odd barges, for use in its interstate commerce transportation service.

While in port at New Orleans, American's marine equipment has the benefit of such fire protection as is afforded all wharves, whether publicly operated at dock charges or privately maintained upon leased banks, all watercraft moored to any of said wharves; as well as of harbor police surveillance, and of all sanitary regulations of State and City Boards of Health; but this presents no more favorable situation, so far as concerns American's interest, than exists in all like river ports which it serves, except that the Dock Board does operate two fire tugs, one of which helped to quench a fire

on the towboat 'Pioneer', in 1943, when the whole of that vessel's galley burned; which necessitated the vessel's remaining in port for 24 days thereafter, in order to effect the galley's replacement before commencement of the usual journey with a tow.

The same benefits are likewise shared by Mississippi Valley, Union and DeBardeleben, to greater or lesser degree, dependent upon their movements in and about the Port of New Orleans.

[fol.236]. American never engages in Louisiana intrastate commerce operations; nor do Mississippi Valley, Union and DeBardeleben.

(3) Mississippi Valley owns 80 barges and 4 towboats, i. e. the Ohio, Indiana, Tennessee, and the Louisiana, with which it ordinarily carries on its interstate commerce transportation as a public carrier, but as increased volume of tonnage is offered at times, or in other like contingencies, temporarily chartered towboats and barges are added to the working fleet. Considering the overall period, an average of 2 to 3 towboats were so chartered and operated in 1943, and, in like manner, barges to the number of slightly less than the 80 barges owned.

No fixed number of barges or towboats, nor particular barges or boats, as such, are ever allocated to any special area within the territory covered by Mississippi Valley's water transportation operations, which begin at Pittsburgh, on the East,

at St. Louis, on the west, and continue downstream to New Orleans, serving all intervening ports, including Cincinnati, Ohio, Evansville, Indiana, Louisville, Kentucky, Cairo, Illinois, Memphis, Tennessee, Vicksburg, Mississippi, and Baton Rouge, Louisiana.

Besides maintaining this regular water transportation service, Mississippi Valley also operates, on occasion, as far north as Minneapolis and on some of the tributaries of the upper Mississippi.

Usually, such barges as are unloaded at any point in discharge, are loaded at once with cargo offered for transportation, to be picked up by the next upstream or downstream tow passing by; but when it is known in advance that surplus tonnage awaits transportation on an outbound trip, all available extra equipment is dispatched to that particular [fol. 237] terminal. Whenever empties are on hand because of lack of cargo offered, and as a passing tow is sufficiently light to profitably haul the barges to other points in need of them, they are so transferred; this is done, for instance, whenever movement of cargo into New Orleans, for any period, consistently exceeds the quantity carried out on return trips northward. Depending upon the season of the year, this process is reversed, at times.

Simply stated, boats and barges are supplied to move cargo whenever offered—no particular towboat or barge—the quantity and kind of cargo indicating however, whether large or small barges, or open or closed barges, are needed.

The sole and only purpose of Mississippi Valley's watercraft coming into Louisiana, past Baton Rouge into New Orleans, from which terminal point such towboats and barges return northward, is to deliver cargo carried in interstate commerce from out of Louisiana to Louisiana points north of New Orleans, and to the Port of New Orleans. A constant water transportation service is maintained and in 1943,—as it has been in all of the past several years,—Mississippi Valley tows arrived at New Orleans once a week or oftener. No barges are ever picked up at Baton Rouge or other Louisiana point for delivery to New Orleans, for any Louisiana port. Loaded barges in a downstream tow are dropped at Baton Rouge, where they remain until unloaded and picked up loaded or empty on the next succeeding return trip northward. Occasionally, as required for loading surplus tonnage offered, empties are dropped at Baton Rouge. No towboat remains at that port any longer than is necessary to tie off or pick up a barge.

[fol. 238] Mississippi Valley's towboats do not travel the same route with regularity and, for instance, during a given period one or more of the boats may not come down the Mississippi as far as New Orleans, while one or more are repeating trips to the port without interruption; and barges made up in a tow, either at Pittsburgh or St. Louis, may all be dropped at intervening river points, as other loaded barges are picked up to replace them, so that the delivered tow at New Orleans may be one that

has been wholly made up en route and is being pushed by other than the boat that started out on the downstream towing trip.

It is the constant aim of Mississippi Valley to unload cargo at point of destination without delay and to immediately re-load the emptied barge with available outbound cargo, so that the same may leave port on the first return trip if the loading is complete, or not later than the second, if not. When a tow reaches New Orleans, or other like terminus, the inbound tow is tied off in two units, the towboat takes on fuel, picks up the loaded outbound tow which awaited its coming, and immediately proceeds out of port. On occasion, however, because of limited cargo offerings, there may be delay in making up a full tow, consequently retarding the outbound trip.

But the ordinary maximum period that any towboat remains in the port of New Orleans is 12 to 48 hours, depending upon whether or not it is in need of emergency repairs. Every possible effort is made to keep the company's watercraft on the move for the greatest number of days a year inasmuch as it earns nothing when tied up. No equipment is ever laid up at any port except for temporary repairs or while awaiting outbound cargo, if not moved to another port where it is known to be more needed. At New Orleans, unless early need of an empty barge is anticipated, the same is moved to another point in order to avoid [fol. 239] accruing wharfage; and empties are moved, at times,

all the way from New Orleans to Cincinnati, or in reverse direction, depending upon how the bulk of water traffic is moving at the particular season of the year. Whenever there is no need of a particular boat or barge, necessitating its being laid-up,—the vessel in question is usually tied up in Mississippi Valley's fleet at Cincinnati.

It may here be observed that, according to the evidence, the usual round-trip voyage between Cincinnati and New Orleans consumes thirty-five days.

Mississippi Valley operates a general repair shop at Cincinnati, where its boats and barges are ordinarily repaired and overhauled, except that, as a matter of course, running or emergency repairs are made wherever they are found necessary; and because Cincinnati has no drydock facilities whatever, as have Pittsburgh, St. Louis and New Orleans, whenever there is need of putting a vessel in drydock to make repairs, the same is done where the facilities therefor are more readily available, but mainly at New Orleans, or Pittsburgh.

At New Orleans, Mississippi Valley employs a maintenance man who looks after the making of all necessary temporary repairs. Those are only such as must be made to enable the affected equipment to move out of the port. If repairs are needed but the trip to Cincinnati may, nevertheless, be safely undertaken, repairing is delayed until that port is reached.

At Cincinnati, St. Louis, Cairo, Memphis, and New Orleans, Mississippi Valley maintains its own terminals where it discharges and takes on cargo. At other points, such as Baton Rouge, Vicksburg, Louisville, Evansville, and Pittsburg, it [fol. 240] makes use of public terminal facilities.

New Orleans, in~~asmuch as it~~ is a port through which is shipped freight in foreign trade —of which there was considerable in 1943 and 1944 because of war conditions—receives the greatest volume of Mississippi Valley's tonnage. A portion of the same is destined for New Orleans consignees, a part is loaded on oceangoing vessels, and some of its loaded barges are transferred to other motive power in uninterrupted towing operations westward by connecting lines, through the Intracoastal Canal, to points of destination in Louisiana or Texas.

Nevertheless, Mississippi Valley's 'taxed' marine equipment rested in the port of New Orleans no more—of the total time possible—than as follows, viz:—In 1943, the four towboats, an aggregate of approximately 17.25%, and the barges, an aggregate of approximately 12.7%. In 1944, by contrast, the towboats, approximately 10.2%, and the barges, approximately 17.5%.

Mississippi Valley's terminal facilities at New Orleans have been located, for the past 15 years, on the Industrial Canal at the Galvez Street wharf, where it occupies dock space, four hundred feet in width, allocated to it by the Dock Board, on a

preferential basis, but this does not mean that its occupancy is exclusive since the Board may assign, in emergencies, part of such space to others as has been done on occasions when occupied areas were available for such assignment. The company maintains its dock office there, in its own structure, and the necessary tractors, trailers, derricks and cranes for loading and unloading of cargo; and maintains, also, a 'business solicitation' office in downtown New Orleans; seven or eight persons being employed at the dock office, and four at the other.

[fol. 241] In St. Louis, Mississippi Valley conducts its home, or main office which is staffed by fifty persons. Both there and at New Orleans, the company has other employees—dock laborers, hired by the hour to load and unload cargo, although a few are employed by the month at fixed salaries. The stevedoring operations at St. Louis, Cincinnati and New Orleans are substantially similar in size and character, although more dock laborers are employed at New Orleans.

(4) Union owns nine towboats and one hundred and twenty-two barges, which it employs in its interstate commerce operations as a water carrier, duly authorized by the Interstate Commerce Commission to ply certain portions of the Mississippi River system, including the Allegheny, Monogahela, Kanawha and Ohio Rivers, and the Mississippi from St. Louis to the Gulf of Mexico, as well as the Intracoastal Canal, west of New Orleans to Houston and Corpus Christi, Texas. In 1944, in addition to the

advantage which normally enures to it by reason of a standing agreement existent between it and other water carriers, for mutual interchange of towing, Union found it necessary to make use of two chartered towboats and many barges as such common carrier of water-borne freight.

No one or more towboats or barges are dedicated to use on any particular section of the inland water system traveled. The flow of traffic normally controls and directs assignment of towboat or barge to service. When a shipper, for example, requires a barge, a suitable one, depending upon the kind of cargo offered, is supplied and, after the loading cargo has been towed to and delivered to the shipper's point of destination, the barge may be re-loaded there and either wends its way back or proceeds further on, in continued movement of cargo, or it may be towed as an empty to any other [fol. 242] port where there is need for it for loading other freight offerings.

It its traffic from Pennsylvania to Louisiana, the principal commodities towed are manufactured steel products, etc., while the outbound freight from Louisiana is, in the main, petroleum products.

All of Union's downstream tows into Louisiana break up at New Orleans, but such barges as carry cargo intended for Texas ports are at once shifted to the motive power of towboats operated by barge lines that ply the Intracoastal Canal.

The bulk of Union's downstream freight originates in the Pittsburgh district, but it picks up cargo as it delivers, at intervening points, and the tow that finally comes to a halt at New Orleans may contain no barge that was once comprised in an original tow made up at Pittsburgh, but only such as were picked up in the tow's progress downstream, by way of replacing those consigned to intervening river points.

The ratio of Union's northbound traffic out of Louisiana to its southbound, is as of 3 to 1, the greater part of the outbound cargoes originating not out of New Orleans, but out of Baton Rouge. The time consumed in making a turn around trip from Pittsburgh to New Orleans is from thirty-five to forty days. A towboat, of necessity, usually stays longer in Pittsburgh than any barge, between trips, for the reason that running repair and maintenance work is done in that port and due consideration must be given to the time-off-requirements of the crew.

Union operates neither terminal nor office at New Orleans, but has a working arrangement with other barge [fol. 243] lines operating in and out of the port by which it assures the movement of its barges, and their tieing-up whenever found necessary. It maintains no employees within the State of Louisiana, except that it does avail itself, for a money consideration, of the services of a shipping agent and importer, on occasion, in the manner and to the extent by it specially directed.

Arriving at Union's southern terminus, an inbound shipment of cargo is delivered in carrying barge to such New Orleans wharf as has been specified by the shipper, where barge and cargo are left at the responsibility of the consignee to be by him unloaded at his or the shipper's expense. When discharge of cargo is effected, the consignee notifies Union, which then seeks to effect prompt removal from the dock.

No towboats or barges are permitted to ever remain in port any longer than is necessary, Union's constant endeavor being to maintain the equipment at the maximum cargo ton mile performance, since it is uneconomical to have its barges lying idle, be it in Louisiana port or any other.

No loaded barge transferred to Union's motive power at New Orleans for northward towing, by any barge line operating out of Texas through the Intracoastal Canal, stays in port any longer than necessary to effect transfer, and, so soon as it is incorporated in a Union tow, it moves up the Mississippi.

All repairs are usually done at Pittsburgh. In New Orleans, Union maintains neither yard nor other repair facilities and equipment. Whenever emergency repairs are needed on either towboat or barges, the same is effected at the nearest available plant.

[fols. 244-251] Of Union's nine towboats, two did not enter Louisiana in 1944, and three of

the seven that did, i. e., the Sam Craig, C. W. Talbot, and J. D. Ayres, each came in but twice for aggregate stays in the port of New Orleans of 70½, 62 and 57½ hours, respectively, and in other Louisiana ports, of 73, 11 and 7½ hours, respectively, in the order named. A fourth, i. e., the Neville, entered three times, for aggregate stays in New Orleans of 99½ hours and in other Louisiana ports of 66 hours. The remaining three, i. e., the Peaco, William Penn, and Jason, each came into the State seven times for aggregate stays in the port of New Orleans of 203, 195, and 137 hours, respectively, and in other Louisiana ports, of 52, 242½ and 517½ hours, respectively, in the order named.

Thirty-eight of the cargo-carrying barges and one fuel flat owned and operated by Union, did not find their way into Louisiana during 1944.

Of the total 8784 hours of 1944, 97.8% were spent by Union's towboats outside of Louisiana ports, 95.7% were similarly spent by its cargo barges, and 98½ by its fuel flats, which last are used for carrying along the towboats required fuel on a long-distance trip, if, as a matter of fact a particular vessel is not provided with sufficient storage space aboard.

Union's home office is at Pittsburgh, and all of its officers are residents of Pennsylvania, within what is referred to as the Pittsburgh district.

* * * * * * *

[fol. 252] As has already been observed, neither DeBardeleben, American, Mississippi Valley, nor Union, is a Louisiana corporation, Delaware being the State that gave the first three 'the power to be as well as the power to function,' while Pennsylvania stands in like relation to Union.

No part of the taxed watercraft and marine equipment of the three was within Delaware, corporate domicile of each, at any time; but Union's like movable property was located in Pennsylvania, from and to which state it was continuously operated in interstate commerce during the years 1944 and 1945.

In none of the cases under consideration can either the State of Louisiana or the City of New Orleans successfully maintain the claimed right to tax any of the movable property in question unless it be established by the evidence that such property has acquired an actual situs for taxation within the State's jurisdictional limits notwithstanding a previously existent situs originally established by law at the domicile of the property-owner."

Judgment of Court of Appeals

That the Court of Appeals did not consider the constitutionality of the statute under review, but was concerned only with its interpretation and application, is shown by the conception of the issue by the Circuit Court

of Appeals. (*Ott v. DeBardeleben Coal Corporation*, 166 Fed. (2d) 509). The Court said: (R. 108)

> "*The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there*".

The Court further said: (R. 110)

> "The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans. With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that with the exception of the eight barges in Alabama, its watercraft were never permanently away from that city; hence the tax situs was in Louisiana and the tugboats and barges having a tax situs there could be taxed by the City of New Orleans".

Continuing, the Court said that the District Court had held the assessment against the property of Debardeleben Coal Corporation having a situs in New Orleans was invalid, because the assessment as a whole, and which was never separable nor divisible, included barges which were permanently situated in Alabama.

The Court summed up its appreciation of the issue and its action as follows: (R. 110)

"The correctness of these rulings with respect to the several companies is the sole question before us".

Since the question of situs and the power of taxation, dependent upon situs, was the sole issue before the court, it conclusively results that the question of the constitutionality of the statute on the ground that it worked an impediment on interstate commerce and was unconstitutional because of the mode of assessment, the court did not decide. The lower court and the Court of Appeals found it sufficient to determine and decide that the taxes were exacted on property which was beyond the taxing power of Louisiana, because the property had not acquired a locus for taxation in Louisiana. The very statement of the issue and the nature of the decision of the Court of Appeals clearly emphasizes the contention that this appeal does not lie, because only a question of fact, involving the situs of property, was decided by the court and the constitutionality of the act under which the taxes were imposed was never trenched upon.

Appellants' Statement of Points to be Relied Upon (R. 133)

1. That Act 59 of 1944 of the Legislature of Louisiana actually fixes the situs in Louisiana of the portion taxed of the watercraft of the three appellee barge lines herein.

2. That there is no prerequisite in said Statute that a taxing situs for this equipment must first be found in Louisiana to enable that State to tax.

3. That all that is required under Louisiana law, to allow Louisiana the right to tax, is the showing that these appellee interstate water carriers operate in Louisiana continually throughout the year; and that such a showing has been indisputably made in these cases.

4. That such taxes have been assessed and collected on a proportionate mileage basis in accordance with Louisiana law.

5. That the Circuit Court of Appeals erred in holding that a taxing situs need be shown to allow New Orleans and Louisiana to collect its share of the taxes on these towboats and barges when the Louisiana Statute (Act 59 of 1944) specifically provides that the proportionate tax is collectible upon a showing that respondent barge line companies run their lines into Louisiana, which is admitted, and no actual situs need be shown as such, to collect these taxes under the Louisiana Statute.

6. That the Circuit Court of Appeals therefore erred in applying the law of situs in these cases.

7. That the Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

8. That the Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.

9. That the Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in

effect, holding that these provisions of the Louisiana Statute violate the due-process-of law clause of the 14th Amendment of the Constitution of the United States.

[fol. 416] 10. That the Circuit Court of Appeals erred in holding for respondent barge lines in these cases decreeing these taxes illegal and invalid.

11. That Act 59 of 1944 of the Legislature of Louisiana is constitutional, is not repugnant to the provisions of the Constitution of the United States, and that Louisiana and its municipalities have the right to their share of ad valorem taxes on the watercraft of these appellee interstate carriers under Louisiana law, as collected in these cases.

1. *That Act 59 of 1944 of the Legislature of Louisiana actually fixes the situs in Louisiana of the portion taxed of the watercraft of the three appellee barge lines herein.*

The statement that the Louisiana Legislature may, by mere declaration, create situs for physical property is not consonant with principles of taxation long recognized and honored in their application. The question of situs is one of fact. It is dependent upon the intent of the owner that property shall remain in a given state and thereby receive all of the benefits that the sovereignty may confer upon the owner and the property. It is, of course, true that the intent of the owner is not purely subjective, but the test is objective, dependent upon the time which the property remains in the state, and it is sometimes determined by the purpose of its remaining. That the Legis-

lature of Louisiana could declare subject to its taxing power property located in the taxing jurisdiction of Pennsylvania, Ohio and Missouri, challenges every principle of protection afforded by the Constitution of the United States under the due process clause. Argumentatively, it is asserted that there is a sceptered power in the Louisiana Legislature to banish into the limbo of dead laws, the protection afforded by the due process clause and the proscription of state power over interstate commerce. To labor the argument in refutation of the contention is to exhaust fundamentals which are easily discernible and applied with equal facility. If the Legislature of Louisiana has power, by mere fiat, to declare the locus of the property for taxation, the power being sovereign in its nature, would have no restriction and so by declaring that property situated in Texas had a locus for taxation in Louisiana, the latter state could tax property beyond its territorial limits as a matter of mere desire.

2. *That there is no prerequisite in said Statute that a taxing situs for this equipment must first be found in Louisiana to enable that State to tax.*

This statement of a point to be relied upon is no more than a restatement of the tax fallacy first propounded. If the State of Louisiana has no power to tax tangibles having a locus in another state, it must follow inevitably that where the Constitution of the United States is invoked, its operation cannot be precluded by the assumption by Louisiana of a power not inhering in its sovereignty. The effect of the Louisiana legislation cannot be given absolute and uncontrolled operation. Where its asserted power collides with the constitutional guar-

antee of the Fourteenth Amendment, it can make no difference whether it prescribes or omits the constitutional requisite for the tax. Theoretically, the Louisiana statute is constitutional and its application not to be denied where it may be properly applied. There can be no question that Louisiana as a sovereignty may choose any method of assessment which is not arbitrary, unreasonable or capricious, and does not transcend its power as State so as to conflict with Federal power and protection. The statute under review may be precisely expressive of the taxing power of the State. The General Assembly might have decided that in the encouragement of commerce, it would not tax to the limit watercraft which has a situs in Louisiana, but which is not in Louisiana during the whole year. It might be a matter of State policy, in the encouragement of vessel owners to locate in the State, to provide that the assessment of these vessels shall be on the basis of time traveled in Louisiana in comparison to the entire mileage traveled by the vessels during the taxing year. When so applied, the statute becomes rational, and the power expressed is constitutional.

The District Court and the Court of Appeals in this case recognized the validity of such a statute and the rationale which dictated its enactment. It held that the property of DeBardeleben Coal Corporation had an actual situs in New Orleans, and, consequently, that its property was subject to the terms of the statute and to be assessed upon the proportionate basis. The decision in the DeBardeleben Coal Corporation case recognized the sense of the statute, and its rational application to a subject of taxation, differing in time and use from real estate, which

remains stationary throughout the year. The movement of the watercraft in and out of Louisiana is suggestive of the purpose of the statute and the policy of encouragement to vessel owners to locate in Louisiana.

> 3. *That all that is required under Louisiana law, to allow Louisiana the right to tax, is the showing that these appellee interstate water carriers operate in Louisiana continually throughout the year; and that such a showing has been indisputably made in these cases.*

The implication of that point is that the tax is put upon the engagement in business and is not an ad valorem tax on the property which is subject to the assessment. It is undeniable that if these appellees carry on throughout the year a business of transportation, that the State of Louisiana might put an income tax upon the net profits of the operations. However, to so concede is not to admit that simply because the business is carried on throughout the year that some part of the equipment not having a situs in fact within the State of Louisiana, may be subjected to an ad valorem tax. It is conceivable that throughout the year, towboats and barges come into Louisiana in connection with its business of transportation. That fact alone, however, would not permit the State of Louisiana to tax a lifting crane or a fuel flat, or some other type of watercraft which comes into the State for but a single day. The fact that these particular kinds of property might be owned by a transportation company and used in connection with the business of the company would not subject it to the taxing power of Louisiana. The argument is suggestive of the contention that any property belonging to a

transportation company operating regularly within the State of Louisiana is subject to an ad valorem tax, regardless of the fact that its stay is casual and impermanent. The power of Louisiana to tax tangibles is dependent upon the dominion of the State over such tangibles, and finds no foundation in the mere fact that the owner of the property sends other equipment regularly into the State. The power to tax one entity does not generate the right to tax another. If it were the business which is sought to be taxed, as distinct from the instrumentalities employed in the business, the statement of the point, while debatable, would not be wholly baseless. There can be no question that some of the towboats and some of the barges of the appellees come into the State of Louisiana in connection with their business, but, equally, it must remain beyond dispute that all of the equipment against which the taxes are assessed has not come into Louisiana, and none of it has acquired a permanent situs for taxation within the State.

4. *That such taxes have been assessed and collected on a proportionate mileage basis in accordance with Louisiana law.*

The argument of the appellants seems to rest upon the conception that there is magic in the proportionate theory of taxation, and that by the black art, property which does not have a taxing situs in Louisiana, is transfigured into such taxable property by the mere statement that the tax is based upon the proportion of mileage traveled within the State and without the State. Before the State can apply the proportionate theory to the taxation of these tangibles, it must first show that they are subject to taxation by the State of Louisiana and that the

proportionate method is a practical and just method of taxation. To baptize the statute as one of apportionment is not to create the power of taxation. The characterization of the statute is no valid substitute for the need of showing the dominion of the state over the property so as to make it subject to the taxing authority of the State. The mere statement that "the taxes are assessed in accordance with Louisiana law", merely states the issue, but does not decide it. If the power of Louisiana were paramount to the authority of the Federal Government, and there be no need to subject the matter to the test of the Federal Constitution, the statement of the point might be material. However, the very question which the court must decide is whether or not the State has power over the tangibles of the appellees and if it so finds there is foreshadowed the next question of whether or not as to vessels, the theory of apportionment is an equitable distribution of the burdens of taxation, or whether, when applied to vessels, the system applicable to railroads is arbitrary and capricious. The statement that Louisiana has legislated that regardless of situs, the property is taxable by Louisiana finds no sanction in legal thinking.

5. *That the Circuit Court of Appeals erred in holding that a taxing situs need be shown when Act 59 of 1944 specifically provides that the proportionate tax is collectible upon a showing that appellees run their lines into Louisiana, and no actual situs need be shown to collect these taxes.*

This point of reliance evidences a complete confusion between a business tax and an ad valorem tax. The

theory of this contention is that if one be engaged in business and comes into Louisiana with any part of its property in connection with that business, the mere arrival of the equipment becomes the basis of the tax. The statement that situs for the imposition of ad valorem taxes need not be shown foretells taxing chaos, which the order of law is intended to prevent. If recognition were given to that statement as a principle of law, it would mean that every port into which a vesesl might go and leave immediately, would have the power of taxation. No such theory has ever received recognition by any court, and if the chaos which the practice would create could be changed into a law, business would be at the mercy of the greed for taxes of every state into which a vessel might go. Nothing in the law has ever foreshadowed such a result, and the teachings of taxation deny even the suggested possibility of such a principle.

6. *That the Circuit Court of Appeals therefore erred in applying the law of situs in these cases.*

The argument of the appellants proceeds upon the theory that if a state statute imposes an ad valorem tax upon tangibles, that the court must make itself bereft of constitutional principles and must be blinded to the existence of the protection of the Fourteenth Amendment. The soul of the argument is that the court must apply the statute, regardless of the power of the state to tax and is inhibited from inquiring into whether or not the power of taxation is existent. The end of the argument is that the constitutional principles must be discarded in the adherence to the enforcement of the statute, regardless of the power of the state to enact it. If that should be, con-

stitutional principles of protection would dissolve from view, and whenever it be urged before a court that property is being taken without due process of law, because the state is without power to tax, the destructive rejoinder would be made that the state says that by enacting the legislation, it has power to tax, and no constitutional inquiry might be made as to whether or not the property is within the dominion of the state.

To reduce the argument to its natural absurdity, if Louisiana imposes an ad valorem tax on ships situated in New York, the court would be without power to declare the tax unconstitutional because the state desired it otherwise. Courts would be precluded from ascertaining whether or not the property had a locus in the state, so as to subject it to taxation, and the only course open to a court would be to enforce the statute according to its terms, regardless of its unconstitutionality.

7. *That the Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.*

This point is merely a restatement of other points, framed in different language, but having the same lack of legal principles. The force of the argument is that if the Legislature of Louisiana says that property is subject to taxation, because it has a locus in Louisiana, that the

declaration of the Legislature makes the asserted fact absolute. Advanced to its ultimate end, the argument is that the power of the Legislature of Louisiana is paramount to the protection and prohibition of the Federal Constitution. The mere assertion of the existence of the statute would denude the court of its judicial function of inquiring as to whether the statute violates constitutional provisions.

8. *That the Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.*

This is, again, a statement of the heretical principle of taxation upon which the appellants rely. The substance of the argument is that if the State of Louisiana applies the proportionate rule of taxation, that regardless of its power to tax, the statute is valid. The foundation of the contention is that if the State of Louisiana employs a method of taxation which would be valid within the field of authority, that the application of the form of taxation is the genesis of the power of taxation. The confusion between the method and the power is the fallacy upon which the whole argument of the appellants is founded.

9. *That the Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in effect holding that these provisions of the Louisiana Statute violate the due-process-of law clause of the 14th Amendment of the Constitution of the United States.*

10. *That the Circuit Court of Appeals erred in holding for respondent barge lines in these cases decreeing these taxes illegal and invalid.*

11. *That Act 59 of 1944 of the Legislature of Louisiana is constitutional, is not repugnant to the provisions of the Constitution of the United States, and that Louisiana and its municipalities have the right to their share of ad valorem taxes on the watercraft of these appellee interstate carriers under Louisiana law, as collected in these cases.*

The three latter points are but repetitious of the same points, stated in a different fashion. The pattern of the argument is substantially the same and the destructive answers to the other points are equally applicable to the last three points. It serves no useful purpose to again answer these points *seriatim*, because it would have the same futility of setting up ten pins solely for the purpose of knocking them down.

Situs is the Foundation for Tax Exaction

It would appear that *Northwest Airline, Inc.*, *v. Minnesota*, 322 U. S. 292, has definitely and permanently settled one of the issues here. While there were dissenting opinions in that case, the dissents were largely concerned with the fact that the decision did not excise the power of other states to tax the airplanes which had been taxed in Minnesota. The cited case proceeded upon the theory that Minnesota gave origin to the Northwest Airlines and that since it derived its powers from that state, and its air-

planes acquired no permanent situs otherwise, that Minnesota, being the state of origin, had the right to tax all of the airplanes, notwithstanding they were not in Minnesota throughout the year and might have been in states other than Minnesota during parts of the year. By analogy, the property of these appellees is taxable in Delaware and Pennsylvania, the states of their creation. This is not to say, however, that if the property of these appellees had, by the process of time, acquired a locus in Louisiana for purposes of taxation, that Louisiana as a sovereignty could have been denuded of its right to exact taxes because other states, for other reasons, had been able to collect taxes on the property; the subject of the present issue. The case is of too recent origin and its discussions so fresh in memory, that it will serve no point to review the facts, but it should suffice merely to state the principles.

During the course of the opinion, the court reviewed *New York Central and H. R. R. Co. v. Miller*, 202 U. S. 584 and said: (295)

> "It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i. e., a taxing situs, elsewhere. That was the decisive feature of the Miller case, and it was deemed decisive as late as 1933 in *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, which was strongly presesd upon us by Northwest. In that case it was not the home State, Illinois, but a foreign State, Oklahoma which was seeking to tax a whole fleet of tank cars used by the oil company. That case fell outside of the de-

cision of the *Miller* case and ours falls precisely within it. 'Appellant had its domicile in Illinois', as Mr. Chief Justice Hughes pointed out, 'and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere'. 290 U. S. 161."

The argument that merely because any part of the watercraft of the appellees comes within the State of Louisiana that it may be taxed regardless of whether it has, within the legal concept, acquired a locus for taxation, is readily disposed of by the following pronouncement of the court. (297)

"The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier 'engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run'. *Union Transit Co. v. Kentucky*, supra, at 206. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce

visiting for fractional periods of the taxing year. (Thus, for instance, 'The coaches of the company . . . are daily, passing from one end of the State to the other,' in *Pullman's Car Co. v. Pennsylvania*, supra at 20, citing the opinion of the court below in 107 Pa. 156, 160). The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

"The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is".

The court further said;

"Minnesota is here taxing a corporation for all of its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted.

See *State Tax Comm'n v. Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State".

The court further said:

"Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks".

In opposition to these principles, the contention was made that since the planes were not continuously in the State of Minnesota, but were in other states for varying periods, in some cases sufficiently long to bring to birth

the concept of situs, that these other states could tax these planes, and the result would be double taxation. It was urged that because of the possibility of other states taxing the planes, because of their permanency in those states, that the State of Minnesota was bereft of taxing power to the extent of the power of other states to tax. The court pointed out that there was no constitutional prohibition against double taxation, and refused to foreclose the question of the taxing power of states other than Minnesota if Minnesota taxed the entire fleet.

Assimilating the cited case to the facts of this case, we find that the court has again recognized the imperishable principle that a state may tax only that property which acquires a situs within the state, and that the state of the domicile may tax property, notwithstanding it does not have a locus in the state of its creation, and may even have a locus in some other state. It also differentiates the apportionment theory between land commerce and commerce by air or water. It limits the apportionment theory to instrumentalities of land commerce, but repudiates the theory insofar as it applies to airplanes. The repudiation in principle must inevitably extend to water craft, and recognize the principle that where such watercraft has not acquired a permanent situs outside of its domiciliary state, that state alone has the power of taxation.

Delaware and Pennsylvania in these cases are the parallels of Minnesota in the Northwest Airlines case. By analogy, Delaware and Pennsylvania might tax this water equipment of appellees because of the benefits conferred upon the corporations by these respective states. How-

ever, Louisiana is without a like power, since it is neither the state of situs, nor the state of creation. Admittedly, under the decision of the *Northwest* case, there is a power in Delaware and Pennsylvania to tax which does not exclude the power of other states to tax if such states have acquired dominion over the property, because of the permanency of the property within such states. In this case, the property moves too rapidly to connote permanency and so, consequently, Louisiana is without authority to tax.

In his concurring opinion, Mr. Justice Jackson points out the nature of airplanes which go from place to place. He points out their regulation by Congress and thereby analogizes the movement of watercraft under similar control by Congress, which necessitates the issuance of a Certificate of Necessity and Convenience by the Interstate Commerce Commission. The contention of the appellants in this case finds clear repudiation in the statement of principles long accepted as controlling when it is said: (305).

> "Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the st. e. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax.

Hays v. Pacific Mail S.S. Co., 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; cf. *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409."

* * * * * *

"It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help. The best analogy that I find in existing decisions is the 'home port' theory applied to ships. See *Hays v. Pacific Mail SS Co.*, *St. Louis v. Ferry Co.*, *Morgan v. Parham*, supra. There is difficulty in the application of this doctrine to air commerce, I grant. There is no statutory machinery for fixing the home port. If federal registration established statehood as it establishes nationality the home port doctrine would be easy to apply."

Even in the late case of *Curry v. McCanless*, 307 U. S. 357, 363, 365, the court recognized and enunciated the principles for which appellees contend. It held that while many aspects of ownership of intangibles may be taxed by different sovereignties, that, nevertheless, tangible personal property is subject to taxation by a single sovereign.

The court said:

"That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for the purposes of the jurisdiction of a Court to make disposi-

tion of putative rights, in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since.

"Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see *Salmond Jurisprudence, Second Edition* (398), its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. *Green v. Van Buskirk*, 7 Wall. 139, 150; *Pennoyer v. Neff*, 95 U. S. 714; *Ardt v. Griggs*, 134 U. S. 316, 320-321. See *McDonald v. Mabee*, 243 U. S. 90, 91; Cf. *Harris v. Balk*, 198 U. S. 215, 222; *Frick v. Pennsylvania*, supra, 497. The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his owner-

ship and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles, if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. See *Union Transit Co. v. Kentucky*, 199 U. S. 194, 202; *Frick v. Pennsylvania*, 268 U. S. 473, 489, *et seq*."

Johnson Oil Company v. Oklahoma, 290 U. S. 158, has facts as near precisely alike as two cases might have when the facts are considered in the light of the law and not absolute conceptions when viewed as an abstraction. In that case, the Johnson Oil Company owned tank cars, which traveled from Illinois, where it had its principal office, to Oklahoma. In Oklahoma, they were unloaded as quickly as possible and returned to Illinois. The court said that in order to determine the controlling Federal principles, it was necessary to review the facts of *Beidler v. South Carolina Tax Commissioners*, 282 U. S. 1, 8. The court said that these cars operated to transport refined products from Oklahoma to various points of delivery throughout the United States.

"They are almost exclusively engaged in interstate commerce. They are very infrequently used in connection with an oil plant appellant owns in Illinois.

> They are sometimes loaded at refineries located in States other than Oklahoma."

The court further said:

> "The cars are almost continuously in movement. Returning to Cleveland to be reloaded, the cars remain on the tracks from twenty-four hours to ten days, depending on the season of the year and the volume of products handled. They are on the tracks for reloading purposes twenty-four hours. Each of the cars makes about one and one-half trips every thirty days, that is, 'each car is loaded at the Cleveland Refinery, sent to the point of delivery, returns to the Cleveland plant, is reloaded and sent out again to a point of delivery each thirty days'."

In the case at bar, the barges are loaded at various points on navigable rivers and are sent to points of destination. There, they remain no longer than they can be loaded and propulsive power secured for returning them upstream. It is to the interest of the owners that the equipment does not lie idle, because each towboat and each barge represents a capital investment, and its value is proportioned to its earning, and, in turn, the earnings are dependent upon the use of the equipment. The greater the use, the greater the income from the use. If a barge remains in Louisiana for any time, it is not at the mere will of the owner with a wish for its remaining, but is there awaiting cargo, or motive power, or for repairs or other matters intimately connected with the transportation service of the owners.

The court in treating these tank cars, said:

"Although rolling stock, such as these cars, is employed in interstate commerce, that fact does not make it immune from a nondiscriminatory property tax in a State which can be deemed to have jurisdiction. *Marye v. Baltimore & Ohio R. Co.*, 127 U. S. 117, 123; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 23; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 82; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152; *Union Tank Line Co. v. Wright*, 249 U. S. 275, 282. Appellant had its domicile in Illinois and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.' See *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 597; *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 69. But the State of the domicile has no jurisdiction to tax personal property where its actual situs is in another State. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 209, 211; *Western Union v. Kansas*, 216 U. S. 1, 38; *Frick v. Pennsylvania*, 268 U. S. 473, 489. While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this

description must be determined on a basis which is consistent with the like jurisdiction of other States.

"The basis of the jurisdiction is the habitual employment of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits. *Marye v. Baltimore & Ohio R. Co.*, supra. This principle has had frequent illustration. It was thus stated in *American Refrigerator Transit Co. v. Hall*, supra (p. 82): 'It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed

were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed.' See also, *Union Refrigerator Transit Co. v. Lynch*, supra; *Union Refrigerator Transit Co. v. Kentucky* supra; *Germania Refining Co. v. Auditor General*, 184 Mich., 618; 151 N. W. 605; affirmed 245 U. S. 632; *Union Tank Line Co. v. Wright*, supra.

"Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were employed in other States where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State."

If Oklahoma could not tax all of the cars of the Johnson Oil Company, which were continuously in motion, neither can Louisiana tax the towboats and barges of the appellees continuously in motion. The fact that only a percentage of the total value is assessed, creates no legal difference, because if it had no power, like Oklahoma, to assess all of the towboats and barges, it can not make the assessment, and the unconstitutionality of the assessment

is not saved by basing the tax upon a percentage of the assessment instead of the totality.

While no case is the exact replica of another case, yet governing principles are the same where the facts are analogous. It is hardly to be supposed that any case, more nearly alike in facts to the present case, can be found than *Johnson Oil Company v. Oklahoma*, supra. If Oklahoma was without power, under the given facts of that case, to tax the tank cars of the Johnson Oil Company, more cogently it is apparent that the State of Louisiana is without the right to tax the property of the appellees. The claimed right of Louisiana is based upon several tenuous grounds. It is claimed that because the towboats and barges of the appellees come into Louisiana, that the Legislature of Louisiana has the right to say that these towboats and barges could be taxed proportionately on the basis of miles traveled within Louisiana and miles traveled without Louisiana. It is argued that Louisiana does not tax the entire value of the watercraft, but only a proportionate value, and because of the principle of apportionment, the tax is sustainable. The argument, of course, overlooks the fact that if Louisiana has the power to tax this equipment, the authority must rest upon more than an act of grace in not taxing the property to its full value, but being satisfied with a percentage of value. It must be clear that the power to tax is plenary and that if Louisiana has the power to tax, it has the right to tax to the full value of the property. If Louisiana has the right to tax merely because the property comes into Louisiana for indefinite and undetermined periods, then every state into which the property goes has a like power of taxation. While Louisi-

ana might be more gracious in not exercising its power to the full, yet, other states might be less gracious and tax the property to its full value. The result would be that every state into which the property goes could exert the plentitude of the power of taxation, and, since the power to tax does not spring from the use of the doctrine of apportionment, every state could treat tangible personal property as if it had an actual situs in that state merely because the property came into the state at irregular intervals and remained for short periods.

Ships Can be Taxed at Their Home Ports or Otherwise Only Where They Have Acquired a Situs

The question at issue of the power of taxation under like facts has been decided in the early dawn of the jurisprudence of this country. The decision has remained unquestioned throughout the juridical history of the country. The case of *Hays v. Pacific Mail Steamship Company*, 17 Howard 597, 713, was decided in 1854. The Pacific Mail Steamship Company was a New York corporation with headquarters in New York and agencies in San Francisco and various other ports. It operated steamships between the port of New York and the City of San Francisco and stopped at intermediate ports. The company owned a naval dock at Benecia, California, for finishing and repairing its ships. The ships were registered at New York. This apparently was not important in the decision of the case.

The *ratio decidendi* was as follows:

"These ships are engaged in the transportation of passengers, merchandise, etc., between the City of

New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized, or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states.

"Now, it is quite apparent, that if the State of California possessed the authority to impose the tax in question, any other state in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State. * * *

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with this *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

St. Louis v. The Ferry Company, 11 Wall. 423, is clearly decisive here.

The court said:

"The court found that the boats, 'when not in actual use, were laid up by the Illinois shore, and were forbidden, by a general ordinance of the City of St. Louis regulating ferries and ferryboats, to remain at the St. Louis wharf or landing longer than ten minutes at a time.' A tax was paid upon the boats in Illinois. Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. * * *"

The court then said:

"They did not so abide within the city as to become incorporated with and form a part of its personal

property. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained."

Morgan v. Parham, 16 Wall. 471, is expressive of the crystallized jurisprudence. The Steamer "Frances" was owned by Morgan, domiciled in New York. "The "Frances" was brought to Mobile in 1865, and from that time until the trial in 1870, had been employed as a coasting steamer between Mobile and New Orleans." The vessel was registered in New York and:

> "In January, 1867, the vessel was regularly enrolled at the custom-house in Mobile by her master, as a coaster, and her license as a coasting vessel was renewed in the several years 1868 and 1869, and with other similar vessels constituted one of a daily line of steamers plying between Mobile and New Orleans."

The court denied, upon these facts, the right of Alabama to tax the vessel, and said:

> "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the states with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value.

The court further said: (478-479)

"The vessel touches tri-weekly or daily at Mobile, and the same at New Orleans. If her regular route were from New Orleans to Mobile, thence to St. Augustine, thence to Savannah, thence to Charleston, and returning by the same course, the case would be no different. She would be engaged in interstate commerce, with her home port still remaining unchanged, and the property continuing unmixed with the permanent property of either State. Her right to trade at each of those ports, without molesation by either of these States, is secured by the Constitution of the United States. The Federal authority has been exerted by the passage of the navigation laws and the issuing of a coasting license to this vessel. All State interference is thereby excluded.

"Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia and South Carolina would have had in the case I have supposed.

"The jurisdiction of this court over the present case, as in the case of Hays v. The Pacific Mail Steamship Company, arises from the facts, first that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and secondly, that the vessel

was lawfully engaged in the interstate trade, over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the States."

Moran v. New Orleans, 112 U. S. 69, affirms the principle of *Hays v. Pacific Mail Steamship Company*. There, the City of New Orleans sought to collect a tax from persons owning and operating towboats to and from the Gulf of Mexico and the City of New Orleans. This was clearly held to be a regulation of commerce among the states and violative of Article 1, Section VIII, of the Constitution of the United States. The rationale of the decision is the freedom of navigation imbedded in the Constitution of the United States from taxation by states. The principle upon which the decision rested was the fact that the State of Louisiana could not exact a tax for the privilege of navigating the Mississippi River. The tax here if sustained would be a tax upon the privilege of coming to and going from New Orleans to other ports on the Mississippi River for the purpose of loading and unloading.

In *Pullman Car Company v. Pennsylvania*, 141 U. S. 18, the Court clearly differentiates the power to tax railroad cars on a milage basis and the right of the State to tax water equipment used in interstate commerce and

remaining within a State temporarily for the purpose of the commerce. There can be no doubt that such water equipment, although used in interstate commerce is not free because of the use to which it is dedicated from the taxing power of a State where it has its situs.

> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; *Telegraph Co. v. Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 211; *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 549; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 124; *Leloup v. Mobile*, 127 U. S. 640, 649.

> "Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdicton, and, therefore, can be taxed only at their legal situs, their home port and the domicile of their owners.

Hays v. Pacific-Mail Steamship Co., 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

"Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no situs so fixed and traversing the land only, the distinction is obvious. As has been said by this court: 'Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and es-

pecially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.' *Railroad Co. v. Maryland*, 21 Wall. 456, 470."

The Court quoted from *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, to the following effect:

> "'While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce.'"

Old Dominion Steamship Company v. Virginia, 198 U. S. 299, 308, approved the principle of *Morgan v. Parham* and differentiated it from the case at the bar. The court, in the *Old Dominion Steamship Company* case, rightly upheld the power of Virigina to tax vessels incorporated into the mass of property of that state. The Old Dominion Steamship Company owned vessels which were intended to and did operate exclusively within the State of Virginia, and, therefore, acquired a situs therein. It was urged that these vessels were taxable only at the domicile of the owner, but the court repelled this contention by holding that where

the owner had incorporated his property into the mass of property of another state, it became subject to taxation by that state.

Ayer & Lord Tie Company v. Commonwealth of Kentucky, 202 U. S. 409, is a solid foundation upon which to rest the contention of the appellees. Kentucky sought to tax the marine equipment of the complainants on the ground that its vessels bore on their sterns "Paducah" as the place of their enrollment. The court held that this alone did not make these vessels subject to the taxing powers of Kentucky if, as a fact, they had not acquired a situs in Kentucky.

The court said:

> "The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicile of the owner it may there be taxed because within the jurisdiction of the taxing authority."

Southern Pacific Company v. Kentucky, 222 U. S. 63, 69, emphasized the principle when it said:

> "The persistance with which this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear

that the vessels had an actual situs elsewhere, is illustrated by the cases of *Hays v. Pacific Mail Steamship Company*, 17 Howard, 596; *Morgan v. Parham*, 16 Wallace 471; *St. Louis v. Ferry Co.*, 11 Wall, 423; *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, ~~and~~ the case of *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409."

This case dug deep by reasoned processes the difference between the theoretical situs of property for the purpose of taxation and actual situs. It determined that since the steamships of the Southern Pacific Company plied between New York and Galveston, that they had not acquired a situs in New York, and that painting upon the stern of these ships "New York" as the home port did not necessarily create the fact of situs in New York.

It said (67):

"The owner has no power to give his vessel a taxable situs by the arbitrary selection of a home port, which is neither his domicile nor the domicile of actual situs."

It properly held, therefore, that for the purpose of taxation personal property must have some situs. Its owner must bear the burden of supporting government in return for the protection which the property receives, and that the owner, by an arbitrary choice of registry or enrollment removed from the actual fact of location, cannot escape taxation. Upon a review of the facts, it found that these steamships had not acquired a taxable location in New York, and, consequently, were taxable at the domicile

of the owner. The court rejected the contention that mere visitation was a substitute for situs, and so held that these steamships were not taxable in New York and, as a consequence, were taxable in Kentucky. The water equipment of the plaintiffs is taxable in Delaware and Pennsylvania respectively.

A State Tax Which is an Impediment to Interstate Commerce is Unconstitutional

Joseph v. Carter & Weekes Company, 330 U. S. 422, involved the constitutionality of a tax on the gross receipts of a stevedoring company, engaged in loading exclusively in interstate commerce. While the case dealt with the constitutionality of the gross receipts tax, as being an impediment on interstate commerce, the principles applicable there are equally applicable here. It is, of course, undeniable that interstate commerce, or the property or net income from interstate commerce, must bear its just share of the tax burden. It is equally true that if the exercise of the power of state taxation has the result of so burdening interstate commerce as to result in an impediment to that commerce, the taxing power of the state must stop at the limits of the constitutional grant of the power of Congress over interstate commerce. The use of the waterways of the country in the service of interstate commerce has become increasingly recognized as a needed use. Any tax that has the effect of preventing the use of the waterways for such needed purpose is unconstitutional.

The power of a state to tax an instrumentality of interstate commerce, which has no locus for taxation within the state, is clearly abridged by the Commerce Clause.

The power of the state to tax is proscribed within the area of interstate commerce subject to the grant of power to the Federal Government. While there is a consistent attempt at accommodation of the prohibition of the Commerce Clause and the taxing power of the state to secure needed revenues, nevertheless, the courts have invariably held that where the tax impedes interstate commerce, or its imposition may lead to its destruction, that the state is without power of taxation resulting in impediment or destruction of interstate commerce:

> "A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. *Western Live Stock v. Bureau*, 303 U. S. 250, 255."

There remains only the application of the principle to the facts. The appellants have asserted the power to tax the towboats and barges of the appellees, even though they do not have a taxing locus in Louisiana. The contention rests upon the unstable ground that if Louisiana applies the apportionment theory of taxation, that it escapes the bane of unconstitutionality. It is asserted by appellants:

> "Where tax apportionment has been allowed, it has never been necessary to show a permanent tax situs, as such, of this equipment, to allow a State its share of taxation."

The statement implements the contention that if the towboats and barges come into Lousiana at all, or re-

gardless of the length of stay, that such towboats and barges may be taxed on a proportion of the mileage traveled in the State of Louisiana as compared to the entire mileage traveled by these towboats and barges within the taxing year. The invalidity of the argument must appear from that fact that the provisions of the statute make it not only applicable to many towboats and barges of a regular line, operating continuously, but make it equally applicable to a single towboat. If the argument of the appellants be pursued to its logical end, and if the statute be held as constitutional, it would result that if a company owned a single towboat and a single barge, that every state through which the towboat and barge passed, as an instrument of interstate commerce, could tax it on the basis of the mileage traveled within that state, in proportion to the mileage traveled in every other state. Thus, for example, if the Union Barge Line Corporation owned but a single towboat and a single barge, and sent the towboat and barge from Pittsburgh to Houston, Texas, each state through which it passed could tax it. If it made no stop in Ohio, Ohio could tax this equipment merely on the basis that it passed through Ohio. The State of Mississippi could tax it on the same basis, and every other state through which it passed on its uninterrupted journey from Pittsburgh to Houston, Texas, could tax it. The multifold taxes could be so great as to exceed the profits from the operation and thereby forbid the owner of the towboat and barge from engaging in interstate commerce. The cited case denies the constitutionality of such a result.

It is undeniable that the mere incidence of a tax on interstate commerce does not decree its destruction. There

must be a needed adjustment between the prohibitions of the Federal Constitution and the taxing power of the states. This accommodation is found by declaring the mere imposition of a tax upon interstate commerce, increasing the cost of that commerce, is not necessarily a ground of nullification, if the tax touches but incidentally or remotely the commerce. However, where the impact of the tax is such as to be an impediment upon that commerce and to interfere with its free flow between the states, then, the defect of unconstitutionality appears. The Federal Constitution prescribes the area in which the taxing power is forbidden to invade. There needs no declaration of Congress to define the limits of forbidden territory to the states.

> "This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables". *Freeman v. Hewit*, 329 U. S. 249, 252. See also *Morgan v. Virginia*, 328 U. S. 373 and *Southern Pacific Co. v. Arizona*, 325 U. S. 761.

The court further said:

"The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenues from interstate commerce."

Western Live Stock v. Bureau, 303 U. S. 250, 255:

". . . The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & Sou. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. R. Co. v. Texas*, supra; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298) or added to (*Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station v. State Tax Comm'n*, 297 U. S. 650) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See *Philadelphia*

& Sou. S. S. Co. v. Pennsylvania, supra, 346; Case of *State Freight Tax*, 15 Wall. 232, 280; Bradley, J., dissenting in *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 235; cf. *Pullman's Palace Car Co. v. Pennsylvania*, supra, 26. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig, Inc.*, 294U. S. 511, 523."

The Method Adopted By the Louisiana Tax Commission Violates "Due Process of Law."

Union Tank Line Company v. Wright, Comptroller General of Georgia, 249 U. S. 275, presents a classical likeness to the issue here. Georgia made an assessment of the Union Tank Line Company property based upon the total mileage its cars were assumed to have traversed while being operated by leasing railroads, and, adopting a percentage based upon an assumed mileage traversed by the cars in the State of Georgia, made an assessment of $291,-195.84.

It was stipulated that the assessment against the plaintiff:

> "covered the value of at least three hundred and fifty cars in excess of the number of cars plaintiff actually had in the State of Georgia for the time said tax was assessed.
>
> "That defendant in entering said assessment never undertook to ascertain the actual property of plain-

tiff's located in the State of Georgia during the said years or to assess its property at its real value for taxation, otherwise than by simply ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia and the railroad mileage traversed by its equipment everywhere as shown by its said return filed on March 16, 1914". (279)

In that case, the taxing authority of Georgia at least ascertained the total mileage and the mileage in Georgia. In this case, these facts were wholly lacking and the assessment rested upon mere guess. The evidence shows that the taxing authorities, did not ascertain the mileage in Louisiana and the mileage outside of Louisiana traversed by all the property of appellees.

The court in the cited case held that the method of assessment violated the "due process of law" clause. The court said that it had recognized the unit rule in the valuation of rolling stock and had approved it as a practical method of tax exacting, which violated no concept of a needed fair contribution to the support of government. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530; *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26; *Adams Express Co. v. Ohio*, 165 U. S. 194. However, in that case that method did not result in the taxation of property subject to taxation, but taxed property not subject to the tax. The same result has been achieved in these cases. The adoption of the unit rule is based upon

the fact that the property assessed is a part of a system. The system as a whole is valued and a part allocated to the state in which the tax is sought to be collected. That, however, is wholly different from valuing as a whole tank cars which are no part of the system. The value of the one is not increased by the value of the other, as they are separate entities, susceptible of individual valuation.

The court then said, after it discussed the unit rule, the following: (282)

> "But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both".

The court further said: (283)

> "In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all States. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to

$47,310—the challenged assessment specified $291,-196.

"We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

Towboats and barges like tank cars are not elements of a system, but individual entities having an absolute and not a related value. Each towboat and each barge has a value susceptible of measurement without relation to anything else. The application of the principle governing tank cars to this case immediately suggests itself.

The Louisiana Tax Commission valued all of the property of each appellee and based its assessment on the entire property of each appellee. It did not value and assess the property in Louisiana. This case is unlike the *Pullman Company* case, where the State valued only the property situated in Pennsylvania and arrived at the amount of the taxes by a method of apportionment. This Court did not uphold any valuation of the entire property of the Pullman Company and allocate a percentage to Pennsylvania for assessment purposes. Here the assessment included the value of property not located in Louisiana, and when a total valuation was reached, a percentage of the total value was allocated to Louisiana, so that into the assessment went the value of property situated in various states as well as property situated in Louisiana. It is easily conceivable that the property out of the State might

have had a different value from the property within the State, so that the total value did not necessarily represent a proportionate value in Louisiana.

J. H. Cain, the Chairman of the Louisiana Tax Commission, who actually made the valuation, when asked if he knew what property was in Louisiana and what property was out of Louisiana, upon which he based his assessment, said:

> "I could not tell you hardly; except to say it's an arbitrary value after trying to get the facts from the taxpayer". (R. 79).

He said that he did not know the proportionate mileage in Louisiana as compared to the entire mileage, but took the valuation of the entire towboats and barges of the appellees and allocated a percentage to Louisiana. He did not know how he arrived at the percentage and when asked why he adopted the percentage given to the property of the appellees said:

> "Just an ordinary figure, they might have been here a 100% of the time, or they might have been here more than 50% of the time, but we figure that that would be a fair assessment for the property in Louisiana". (R. 81).

When asked how he arrived at his figures, he said:

> "Well I don't know that I could hardly answer that question, except trying to be fair". (R. 77).

The basis of his assessment is that he was trying to be fair to the other states by adopting a percentage of

value, and leaving to other states the adoption of other percentages. The other members of the Tax Commission testified substantially the same that they did not know the value of the property, nor the percentage of travel in Louisiana. In the choice of a percentage of the total value allocated to Louisiana, Mr. Cain did not know upon what it was based,

> "There is nothing indicating it might have been one-half instead of one-third. Or might have been three-fourths in the absence of any real basis for making the assessment". (R. 91).

He further said:

> "in the absence of the information having been furnished. I would say that would be arbitrary". (R. 91).

There can be no doubt that in taking the entire property of each of these appellees, whether situated within or without Louisiana, as the basis of the assessment, and exacting taxes on such assessment, these taxes were taken without due process of law. The fact that only a percentage of the entire value was taken, makes it no less a taking in violation of the Constitution. If Louisiana could take any percentage of the entire value of the property of the appellees, regardless of locus, it could take 100%, because there is no limitation upon its plenary power of taxation when the property taxed is subject to its dominion.

If it can tax the entire property on a percentage of 25%, every other state through which the property operates can select its own percentage, so that the entire property of the appellees could be taken by taxation and be-

cause of the possibility of so doing, the states would have the power, not only of impeding the free flow of commerce, but of actually destroying it.

We respectfully submit that the appeal does not lie, because the Court of Appeal did not hold unconstitutional the statute of Louisiana, and for the further fact that even if it had held the statute invalid as applied, its action would have been correct, because as applied to the property of the appellees, it amounted to the taking of property without due process and to the imposition of taxes upon instrumentalities of interstate commerce, with the probable result of not only impeding, but of destroying, that commerce.

Respectfully submitted,

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